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No. 83-1047

In the Supreme Court
OF THE
United States

October Term, 1983

FRANKLIN JEFFERSON,
Petitioner,

vs.

JOHN O. MARSH, SECRETARY OF THE ARMY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Argument..... 1

I

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to calculate reasonable attorneys' fees by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly fee..... 1

II

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to articulate clear and concise reasons for the fee award..... 5

Conclusion..... 9

TABLE OF AUTHORITIES CITED

Cases

Page

Blum v. Stenson, No. 81-1374, ___ U.S. ___, 52 U.S.L.W. 4377, (March 21, 1984).....2,3,4,7,8,9

Hensley v. Eckerhart, No. 81-1244, 461 U.S. ___, 76 L.Ed.2d 40, 51 U.S.L.W. 4552 (1983)...2,3,4,5,7,8,9

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October Term, 1983

FRANKLIN JEFFERSON, Petitioner.

vs.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY,
ET. AL., Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER FRANKLIN JEFFERSON

ARGUMENT

I.

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to calculate reasonable attorneys' fees by multiplying the number of hours reasonably expended on the litigation by a reasonable

hourly rate.

Respondent contends (Rsp.Brief, 4) that the District Court is not required, in every instance, to calculate attorneys' fees based on a reasonable number of hours and a reasonable rate, citing Hensley vs. Eckerhart, 461 U.S. ___, 76 L.Ed.2d 40, 51 U.S.L.W. 4552 (1983). This argument of Respondent is without merit. The clear message from the decisions of this Court is that the only objective way to calculate a reasonable attorneys' fee award is to first multiply the number of hours reasonably expended on the litigation by a reasonable hourly rate. In Hensley this Court stated that such calculation is the "most useful starting place" in determining a reasonable attorneys' fee (51 U.S.L.W. at 4554). In a more recent case, Blum vs. Stenson, ___ U.S. ___, 52 U.S.L.W. 4377, No. 81-1374 (March 21, 1984), this Court

reiterated this view when it concluded that the initial estimate of a reasonable attorneys' fee is properly calculated as the product of the number of hours reasonably expended on the litigation times a reasonable hourly rate (52 U.S.L.W. at 4377, citing Hensley). The District Court in this case never determined what was a reasonable number of hours and utilized no calculation scheme whatever. In fact, the Respondent concedes this point, as it must (Rsp.Brief, 5). The District Court simply, and arbitrarily, set the attorney's fee award at $6,000 (App. D, 12a, and App. E, 13a, of Rsp. Brief). The fee award of $6,000 cannot stand because it invited other courts to arbitrarily and capriciously set attorneys' fees at any level without making a basic fee calculation. This is clearly a result not intended by either Hensley or Blum.

Respondent also contends (Rsp. Brief, 5) that the rate of $50 per hour for the Petitioner's Senior Counsel, Mr. Oler, was reasonable. This contention is without merit. In his request for attorneys' fees Mr. Oler submitted documented evidence, in the form of a Declaration and case authority, to establish the prevailing market rate in the District of Oregon. He submitted evidence of attorneys' fee awards in similar cases in the District of Oregon. He clearly established the rates as between $70 and $150 per hour. Thus, under these circumstances, the allowance of only $50 per hour for Mr. Oler, in light of his skill, reputation and abilities (Pet. 22), was clearly unreasonable.

Since the Court of Appeals failed to require the District Court to make a fee calculation, it committed reversible error.

II.

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to articulate clear and concise reasons for the fee award.

Respondent also contends (Rsp.Brief, 4-5) that even though the District Court made no fee calculation, it did give sufficient reasons for the $6,000 award. This argument is likewise unpersuasive and clearly avoids the real issues presented. It is clear from this Court's reasoning in Hensley and Blum that after making the initial fee calculation, the District Court must give clear and concise reasons for any upward or downward adjustment thereto (Hensley, supra.). The District Court herein gave several unpersuasive reasons for why it awarded a fee which was so drastically reduced from the $112,000

requested. One reason the Court gave was because of the duplication of work by the Petitioner's two attorneys (Pet.App. C-9). Other reasons given by the District Court included the degree of success and the quality of representation (Pet.App. C-9).

All of the reasons given by the District Court to support the fee award of only $6,000 are merely unsupported conclusions. The fact is that Mr. Oler, a San Francisco attorney, represented Petitioner because no local attorney could be found in Oregon who was willing to handle this employment discrimination case, which the District Court well knew because of other similar cases pending before it. Mr. Oler was required by the Local Rules of the District Court to associate local counsel. Mr. Keith Raines so associated. Both attorneys fully and vigorously prosecuted Petitioner's case. Petitioner prevailed

on three (3) of the six (6) claims he presented. His attorneys obtained a preliminary injunction preventing the termination of his employment, and also obtained, after judgment in his favor, a temporary restraining order preventing Respondent from once again terminating his employment. His attorneys also obtained appropriate monetary damages for him (Pet. 4, 5, 21). Thus, Petitioner's two attorneys obtained "excellent" results for him, and are therefor entitled to be fully compensated therefor. Hensley, supra.; Blum, supra. In seeking reasonable attorneys' fees, Petitioner's attorneys presented complete itemizations and detailed calculations to support their claim of $112,000 which the District Court unjustifiably rejected out-of-hand.

The gross disparity between the $112,000 in attorneys' fees requested and

the $6,000 actually awarded demonstrates that the District Court utilized an erroneous standard for determing what constituted a reasonable fee award. The District Court failed to make a basic fee calculation, and the reasons it gave for reducing the award so drastically to only $6,000 were clearly insufficient. The actual out-of-pocket expenses incurred by Petitoner and his attorneys in litigating this matter exceeded the $6,000 awarded, leaving no real attorneys' fee for the Petitioner's attorneys. Since the District Court failed to apply the proper standard in determining reasonable attorneys' fees, the Court of Appeals could not have conducted a meaningful reveiw of the award. It should have remanded this case to the District Court for the application of the proper standards under Hensley and Blum.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petiton, it is respectfully submitted that the Petiton for a Writ of Certiorari be granted and that the District Court be directed to set a reasonable attorneys' fee based on the standards announced in Hensley and Blum based on the number of hours reasonably expended in this litigation and a reasonable fee rate.

RESPECTFULLY SUBMITTED,

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